

IN THE COURT OF APPEALS OF IOWA

No. 8-1002 / 08-1822
Filed December 31, 2008

**IN THE INTEREST OF A.L.,
Minor Child,**

**M.D.L., Father,
Appellant.**

Appeal from the Iowa District Court for Polk County, Carol S. Egly, District Associate Judge.

A father appeals from the order terminating his parental rights.

AFFIRMED.

John Heinicke of Kragnes & Associates, P.C., Des Moines, for appellant father.

Alexandra Nelissen of Nelissen & Juckette, P.C., Des Moines, for mother.

Thomas J. Miller, Attorney General, Kathrine Miller-Todd, Assistant Attorney General, John P. Sarcone, County Attorney, and Kevin Brownell, Assistant County Attorney, for appellee State.

Jessica Miskimins, Des Moines, for minor child.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

MAHAN, J.

Mikel appeals the district court's order terminating his parental rights to his eighteen-month-old son, A.L. He claims the juvenile court erred in terminating his parental rights due to the exceptions provided in Iowa Code section 232.116(3) (2007). We affirm.

I. Background Facts and Proceedings.

A.L. is the child of Mikel and Tarayia.¹ A.L. was removed from his home in March 2008 and was adjudicated a child in need of assistance (CINA) under Iowa Code sections 232.2(6)(c)(2) and (n) in May 2008 due to domestic abuse concerns and safety issues arising from Tarayia's instability, Mikel's criminal charges, and exposure to illegal drugs. A.L. was initially placed in foster care upon his removal in March 2008, but was moved within a week to the home of his paternal grandmother.²

The termination hearing was held in October 2008. Mikel had not seen A.L. in the six months prior to the termination hearing and had been incarcerated or on the run from criminal authorities since five days after A.L.'s birth in June 2007. At the time of the termination hearing, Mikel resided at the Fort Dodge Correctional Facility and was scheduled to be released on November 27, 2009. The district court found clear and convincing evidence supporting termination of Mikel's parental rights pursuant to Iowa Code sections 232.116(1)(d),(e), and (h). By order dated October 29, 2008, Mikel's parental rights were terminated. He now appeals.

¹ The parental rights of Tarayia were also terminated, but she does not appeal.

² A.L. has remained in his grandmother's care since that time.

II. Scope and Standard of Review.

We review termination of parental rights de novo. *In re Z.H.*, 740 N.W.2d 648, 650-51 (Iowa Ct. App. 2007). Grounds for termination must be proved by clear and convincing evidence. *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006). Our primary concern is the best interests of the child. *Id.*

III. Merits.

The court terminated Mikel's parental rights pursuant to sections 232.116(1)(d),(e), and (h). The actual grounds for termination of his parental rights under these sections are not being contested or appealed. Mikel concedes the grounds for termination have been met. He contends, however, that the court erred in failing to consider the exceptions to termination as set forth in section 232.116(3)(a) and (c). The relevant portions of this section state:

3. The court need not terminate the relationship between the parent and child if the court finds any of the following:

(a) A relative has legal custody of the child.

....

(c) There is clear and convincing evidence that the termination would be detrimental to the child at the time due to the closeness of the parent-child relationship.

Iowa Code § 232.116(3)(a), (c). A termination, otherwise warranted, may be avoided under the exceptions in this section. *In re D.E.D.*, 476 N.W.2d 737, 738 (Iowa Ct. App. 1991). The factors under section 232.116(3) have been interpreted by the courts as being permissive, not mandatory. *In re C.L.H.*, 500 N.W.2d 449, 454 (Iowa Ct. App. 1993). The words "need not terminate" are clearly permissive. *Id.* The court has discretion, based on the unique circumstances of each case and the best interests of the child, whether to apply the factors in this section to save the parent-child relationship. *Id.*

After a careful review of the record, we conclude the exceptions in section 232.116(3)(a) and (c) do not apply to the facts of this case. Mikel contends his parental rights should not be terminated because he has a bond with his son. Although Mikel obviously loves his son and is making an effort to stay out of trouble in prison, the record does not show a bond between Mikel and A.L. Mikel points to time he spent with A.L. when he has been out of prison, but the fact remains that Mikel has been incarcerated or fleeing from criminal authorities since A.L.'s birth. He has not seen A.L. in months and admits he has not had a relationship with A.L. since June 2008. The court did not abuse its discretion in failing to utilize this exception.

Mikel further claims his parental rights should not be terminated because A.L. is placed with a relative. A.L. has been in the care of his paternal grandmother since his removal in March 2008. With regard to the grandmother's care for A.L., the court stated:

[A.L.] is entitled to look to the one person who has consistently cared for him as a parental figure. The scope of his parents' problems is such that in the foreseeable future they are unlikely to be able to contribute in a positive way to his care. Emotionally A.L. needs to see the placement with his grandmother as permanent. Ongoing court involvement disrupts the concept of "permanency" and will be necessary if parental rights are not terminated.

Although the record shows that A.L. is placed in the legal custody of a relative, the exception in section 232.116(3)(a) is permissive, not mandatory. Upon our review, we determine that Mikel's rights should be terminated, and we therefore decline to apply the exception. The district court properly exercised discretion in this case.

A.L. has waited for almost a year for his father to provide the safe and stable home he deserves. Mikel's criminal issues and incarceration have broken any bond that may have existed with his son. Given A.L.'s age, his need for permanency, domestic abuse concerns, and his father's criminal history, it is in his best interests that parental rights be terminated. Accordingly, we affirm the district court's order.

AFFIRMED.